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HRD09/4350

May 21, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

**RE: Request for comments on Charles Dando, Sr., et al.'s (TMK (2) 3-4-033:014)
Surface Water Use Permit Application – Existing Use, Nā Wai `Ehā Surface Water
Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Charles Dando, Sr., Charles Dando, Jr., Judy Dando, and Jena Munson's (collectively, the Dandos) Surface Water Use Permit Application (SWUPA) for an existing use on TMK (2) 3-4-33:014 in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined

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whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, the Dandos should not have any priority simply by virtue of the fact that they filed their SWUPA earlier than other existing users.

Assuming that sufficient water is first restored to adequately provide for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights, OHA would have no objection to the continuation of domestic uses such as the Dandos', but has several concerns with the Dandos' SWUPA. OHA notes that the 1,705 gallons per day (gpd) the Dandos claim as an existing use appears to be excessive. That volume, on 0.50 acres, amounts to approximately 3,400 gallons per acre per day (gad), which not only exceeds the Maui County Department of Water Supply planning guidelines for single family and duplex residences (3,000 gad or 600 gpd per unit) and the water duty established by the Commission for diversified agriculture on Oahu's dry leeward plain (2,500 gad), it is also significantly more than the 2,217 gad claimed as an existing use by a commercial landscaper, Kihei Garden and Landscaping Company, LLP. The Dandos' SWUPA does not explain the excessive use.

OHA also notes that the "Alternatives Analysis" (Table 4) in the Dandos' SWUPA is neither accurate nor helpful. It does not explain (other than the conclusory (and erroneous) statement that "[w]ater for non potable use is not available from the municipal source") why, for example, the Dandos could not use municipal water to water their lawn, as their neighbors presumably do.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o
Administrator

C: OHA CRC Maui